Petition

Office - Supreme Court, U.S.
FILED
SEP 18 1981
ALEXANDER L. STEVAS,
CLERK

81-578

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LEROY OGLE,

PETITIONER

v.

THE STATE OF OREGON

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF OREGON

Dean Heiling
HEILING & McINTOSH
223 S. E. Fowler
Roseburg, OR 97470
Phone: 673-0171
Attorneys for Petitioner

David Frohnmayer
ATTORNEY GENERAL
Rudolph Westerband
ASSISTANT ATTORNEY GENERAL
100 State Office Building
Salem, OR 97310
Phone: 378-4402
Attorneys for Respondent

QUESTION PRESENTED FOR REVIEW

Does Waller v. Florida, 297 US 436, 90 S. Ct. 84, 25 L Ed. 2d 435 (1970) prohibit the State of Oregon from prosecuting Petitioner in the state court for the same activity for which Petitioner was previously prosecuted in municipal court?

SUBJECT INDEX

	Page
Petition	1
Lower Court Reports	2
Grounds for Jurisdiction	2
Constitution Provisions & Statutes	3
Statement of the Case	8
1. Nature of the Action	8
2. Nature of the Judgment	8
3. Question Presented on Appeal	8
4. Statement of the Facts	8
Issues Raised in State Courts	12
Reason for Granting the Writ	13
1. The State of Oregon has failed to follow this Court's holding in Waller v. Florida, 297 US 436, 90 S. Ct. 84, 25 L Ed. 2d 435 (1970) and Petitioner has been prosecuted and convicted twice for a single act alleged to constitute three crimes.	13
Argument	14
Conclusions	18

APPENDIX

Supreme Court Opinion	App 1-3
Court of Appeals Opinion	App 4-9

The following items are voluminous and not indespensible to a reasonable understanding of the issue in this case, and are therefore being separately presently pursuant to Rule 21(k).

APPENDIX (Con't)

Uniform Traffic Citations . . . . App 10-12
The District Attorney's Information . . . . . App 13
Motion to Dismiss and Supporting Affidavit . . . . . App 14-16
Trial Court Order on Arraignment App 17
Order on Sentence . . . . . App 18-19
Motion to Supplement Petition for Review . . . . . App 20-24
Oregon Supreme Court's letter of June 13, 1980 . . . . . App 25
Oregon Supreme Court's letter of December 10, 1980 . . . . . App 26
Oregon Supreme Court's letter of December 22, 1980 . . . . . App 27
Petition for Rehearing . . . . . App 28-29
Oregon Supreme Court's letter of July 21, 1980 . . . . . App 30

INDEX OF AUTHORITIES

Page

Cases Cited:

Miller v. Hansen,
126 Or 297, 269 P 864 (1929) . . 15
Waller v. Florida,
297 US 436, 90 S. Ct. 84,
25 L Ed. 2d 435 (1970) 13, 14

Statutes Cited:

ORS 131.515(2) 4, 5
ORS 135.640 13
ORS 484.365 . . . . . 5, 6
ORS 484.395(1) 6
ORS 484.540 . . . . . 6, 7
ORS 484.560 7

Lower Court Reports:

State of Oregon v. Leroy Ogle,
291 Or 364, ____ P2d ____ (1981) 1
State v. Ogle,
46 Or App 109, 610 P2d 1242
(1980) 13

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LEROY OGLE,

PETITIONER

v.

THE STATE OF OREGON,

RESPONDENT

PETITION FOR WRIT OF CERTIORARO

TO THE SUPREME COURT OF THE STATE OF OREGON

Petitioner Leroy Ogle petitions the United States Supreme Court for a writ of certiorari to the Supreme Court of the State of Oregon in the case of The State of Oregon v. Leroy Ogle, case number 27079, 291 Or 364 630 P2d 865 (1981).

LOWER COURT REPORTS

Trial Court: Motion to Dismiss. Denied.
Circuit Court of the State of Oregon for Douglas County, case number J-79-1308, July 11, 1979.

Appellate Court: Trial Court Affirmed.
Court of Appeals of the State of Oregon, case number 15826, opinion filed May 12, 1980. 46 Or App 109, 610 P2d 1242 (1980).

Reviewing Court: Petition for Review. Dismissed.
Supreme Court of the State of Oregon, case number 27079, 291 Or 364, 630 P2d 865 (July 8, 1981)

GROUNDS FOR JURISDICTION

The Oregon Supreme Court dismissed the Petition for Review of the opinion of the

Oregon Court of Appeals on July 8, 1981, and denied Petitioner's Motion for Rehearing on July 21, 1981.

This Court has jurisdiction of this petition for writ of certiorari pursuant to 27 USC 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

(1) Fifth Amendment, United States Constitution.

> "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb. . . ."

(2) Oregon Constitution

(a) Article VII, Section 1

> "The judicial power of the state shall be vested in one supreme court and in such other courts as may from time to time be created by law. . . ."

(b) Article VII, Section 2b

> "Notwithstanding the provisions of Section 23, Article IV of this Constitution, laws creating courts

inferior to the Supreme Court or prescribing and defining the jurisdiction of such courts or the manner in which such jurisdiction may be exercised, may be made applicable:

(1) To all judicial districts or other subdivisions of this state; or

(2) To designated classes of judicial districts or other subdivisions; or

(3) To particular judicial districts or other subdivisions."

(c) Article XI, Section 2

"Corporations may be formed under general laws, but shall not be created by the Legislative Assembly by special laws. The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon. . . ."

(3) Oregon Statutes.

(a) ORS 131.515(2)

"No person shall be separately prosecuted for two or more offenses based upon the same criminal episode, if the several offenses are reasonably known to the appropriate prosecutor at the time of commencement of the first prosecution and establish proper venue in a single court."

(b) ORS 484.365

(1) "Any Class A traffic infraction, as defined in subsection (3) of this section, shall be prosecuted and be punishable as a Class A misdemeanor if the defendant has been convicted of a Class A traffic infraction, as defined in subsection (3) of this section, or traffic crime within a five year period immediately preceding the commission of the offense, and the previous conviction was not part of the same transaction as the present offense.

* * *

(3) As used in this section, 'Class A traffic infraction' means:

(a) Driving while under the influence of intoxicants.

(b) Failure to perform the duties of a driver involved in an accident or collision which results only in damage to the property of another.

(4) As used in this section, 'traffic crime' means:

* * *

(b) Driving a motor vehicle while suspended or revoked.

* * *"

(c) ORS 484.395(1)

"Notwithstanding ORS 131.505 to 131.535, if a person commits both a crime and a traffic infraction as part of the same criminal episode, the prosecution for one offense shall not bar the subsequent prosecution for the other. However, evidence of the first conviction shall not be admissible in any subsequent prosecution for the other offense."

(d) ORS 487.540

"A person commits the offense of driving while under the influence of intoxicants if the person drives a vehicle while the person:

(a) Has .10 percent or more by weight of alcohol in the blood of the person as shown by chemical analysis of the breath, blood, urine or saliva of the person made under ORS 487.805 to 487.815 and 487.825 to 487.835; or

(b) Is under the influence of in-

toxicating liquor or a controlled substance; or

(c) Is under the influence of intoxicating liquor and a controlled substance.

Driving while under the influence of intoxicants is a Class A traffic infraction."

(e) ORS 487.560

(1) " A person commits the crime of driving while suspended if he drives a motor vehicle upon a highway during a period when his license or permit to drive a motor vehicle or his right to apply for a license to drive a motor vehicle in this state has been suspended by a court or by the division or revoked by the division or if he drives a motor vehicle outside the restrictions of a license issued under ORS 482.475 or 482.477. . . .

(6) Driving while suspended or revoked is a Class C felony if the suspension or revocation was the result of a finding that the person is an habitual traffic offender under ORS 484.730 or of a conviction for any of the following reasons:

* * *

(f) Driving while under the influence of intoxicants."

STATEMENT OF THE CASE

1. Nature of the Action: This is a criminal case in which petitioner was accused by the State of Oregon of "felony driving while suspended."

2. Nature of the Judgment: Upon stipulated facts, petitioner was found guilty of the crime "felony driving while suspended" and sentence was imposed.

3. Question Presented on Appeal: The Oregon appellate courts were asked to decide whether denial of petitioner's motion to dismiss the district attorney's information constituted double jeopardy?

4. Statement of the Facts: Generally, the facts are that petitioner was tried for a crime in Myrtle Creek, Oregon, Municipal Court and later tried for the same criminal transaction, the present case, in Douglas

County, Oregon, Circuit Court, notwithstanding petitioner's claim of double jeopardy.

A more specific accounting of the facts is:

On May 17, 1979, petitioner was arrested while driving a motor vehicle in the city of Myrtle Creek, Oregon, and was issued three traffic citations. The citations charged respectively, driving while under the influence of intoxicants,[1] driving with more than .10 percent alcohol in his blood,[2] and driving while suspended,[3] all alleged to be crimes in violation of state statutes. The two alcohol related charges were filed in the Myrtle Creek Municipal Court and the driving

---

[1] ORS 487.540(1)(b)

[2] ORS 487.540(1)(a)

[3] ORS 487.560

while suspended charge was filed in the State District Court for Douglas County.

On June 7, 1979, petitioner was arraigned in District Court on a district attorney's Information charging the felony of driving while suspended. Petitioner waived a preliminary hearing and was bound over to the Circuit Court.

On June 13, 1979, the district attorney filed an Information in Circuit Court charging petitioner with all three offenses. On that same day a representative from the district attorney's office called the Myrtle Creek Municipal Court and requested that the two charges against petitioner in that county be dismissed. Neither the city attorney, the petitioner nor the petitioner's attorney was notified of the request for

dismissal. The charges were not dismissed and the district attorney's office did nothing further regarding that request.

On June 15, 1979, petitioner was tried on the two alcohol related charges in the municipal court by the city attorney. He was convicted and sentenced on the charge of driving while under the influence of intoxicants. He was acquitted of driving with more than .10 percent alcohol in his blood.

On June 18, 1979, petitioner was arraigned in Circuit Court on three charges reflected in the Information filed by the district attorney on June 13, 1979. He moved for dismissal of all three charges on the basis of the rule against double jeopardy. The court dismissed the two alcohol related charges. After trial to the court on

stipulated facts, petitioner was convicted of felony driving while suspended.

ISSUES RAISED IN STATE COURTS

1. Douglas County Circuit Court: On June 19, 1979 petitioner filed a motion to dismiss the indictment on general double jeopardy principals.

On July 11, 1979 the trial court entered an order granting petitioner's motion as to the two counts previously tried in municipal court, but denied the motion as to the third count of felony driving while suspended.

2. Oregon Court of Appeals: On October 31, 1979 Defendant filed his notice of appeal.

On May 12, 1980 the Oregon Court of Appeals affirmed the trial court on the basis of Oregon Constitution, Article I, Section 12.

State v. Ogle, 46 Or App 109, 610 P2d 1242, (1980).

3. Oregon Supreme Court: On review to the State Supreme Court, petitioner initially continued with his general double jeopardy approach. Petitioner then specifically raised the issue of Waller v. Florida, supra, and the Court agreed to consider that specific point on June 11, 1980. Cf. ORS 135.640.

On December 9, 1980 the Oregon Supreme Court granted petitioner's request for review. On July 8, 1981 the Oregon Supreme Court dismissed the petition for review.

REASON FOR GRANTING THE WRIT

The State of Oregon has failed to follow this Court's holding in Waller v. Florida, 297 US 436, 90 S. Ct. 84, 25 L. Ed. 2d 435, (1970) and Petitioner has been prosecuted

and convicted twice for a single act alleged to constitute three crimes.

ARGUMENT

Waller v. Florida, 298 US 436, 90 S. Ct. 48, L. Ed. 2d 435 (1970) involved the petitioner's being tried first in municipal court and then in state court for the same act and transaction. This Court held:

> "[W]e hold that on the bais of the facts upon which the Florida District Court of Appeal relied petitioner could not lawfully be tried both by the municipal government and by the State of Florida. In this context, a 'dual sovereignty' theory is an anachronism, and the second trial constituted double jeopardy violative of the Fifth and Fourteenth Amendments to the United States Constitution." 397 US at 394-95, 90 S. Ct. at 1188-89.

This Court pointed out that several states had been treating municipalities and the state as separate sovereign entities, 297 US at 391, 90 S. Ct. at 1187, including

Oregon. See Miller v. Hansen, 126 Or 297. 269 P2 864 (1928).[4]

As this case presently stands petitioner has been subjected to multiple convictions and multiple sentences for a single act. Oregon law does not provide for merger of convictions and sentences between municipal and state courts, and petitioner has no relief from the double jeopardy.[5]

---

[4]The Oregon appellate courts have acknowledged that the Waller rule applies to Oregon. State v. Alexander, 44 Or App 557, 607 P2d 191, (1980); State v. Brown, 262 Or 442, 497 P2d 1193, 1196, note 19 (1972). However, for reasons not mentioned, Oregon has declined to follow Waller. State v. Jones, 45 Or App 307, 608 P2d 572 (1980); State v. Sleeper, 36 Or App 227, 585 P2d 333 (1978).

[5]See footnote 4, supra.

From the outset, the prosecuting attorney in this case has made no reasonable effort to avoid the multiple prosecutions. Under the ruling of the Oregon appellate courts, no such duty on the prosecutor exists, and municipalities and the state are still regarded as separate sovereign entities.[6]

The Oregon Supreme Court, in dismissing the petition, reasoned that although petitioner was first tried for two "crimes," the record was silent on whether petitioner's ultimate conviction was for a "crime" or a

---

[6]The pertinent provisions of the Oregon Constitution are substantially the same as those of the Florida Constitution. See supra, p. 4-5.

mere "infraction,"[7] and therefore the record was inadequate to show whether the rule against double jeopardy applied. That reasoning erroneous, since petitioner was prosecuted for two crimes in municipal court, and later prosecuted for the crime in this case. Failure of the prosecution to prove the first case does not open the door to subsequent prosecution for the same criminal activity. U.S. Constitution, Amendment V.

---

[7] ORS 484.365 provides that the offense of driving under the influence can be either a Class A misdemeanor (a crime) or a traffic infraction (a non-crime) as circumstances dictate. The Oregon Supreme Court reasoned that "defendant would have the procedural protections applicable to criminal trials in either event, but this would not affect the interpretation and interrelation of ORS 474.365 and ORS 484.395." The latter statute provides that prosecution for a traffic infraction shall not bar a subsequent prosecution for a crime arising out of the same criminal episode. See supra, p. 6.

CONCLUSION

The judgment of conviction in this case should be vacated.

Respectfully Submitted,

Dean Heiling
HEILING & McINTOSH
Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc

STATE OF OREGON,
Respondent,
v.
LEROY OGLE,
Petitioner.

(TC J79-1308, CA 15826, SC 27079)

On Review from the Court of Appeals.*

Argued and submitted January 7, 1981.

Dean Heiling, of Heiling & McIntosh, Roseburg, argued the cause and filed a brief for petitioner.

Rudolph Westerband, Assistant Attorney General, Salem, argued the cause for respondent. On the brief were James A. Redden, Attorney General, Walter L. Barrie, Solicitor General, and W. Benny Won, Assistant Attorney General.

PER CURIAM.

Petition dismissed.

*Appeal from Circuit Court, Douglas County. Don H. Sanders, Judge. 46 Or App 109, 610 P2d 1242 (1980).

App. 2 and 3 translated in printing.

App 3

preceding five years, ORS 484.365),[3] but the record does not show whether the municipal court judgment was a conviction for a crime as charged or only for a noncriminal infraction.[4] The judgment was not introduced into evidence in the circuit court case.

This prevents a proper analysis of the statutory law governing this case, and we do not decide the constitutional validity of a statutory scheme when the record leaves the law applicable to the case before us in doubt. Accordingly, we express no view on the correctness or incorrectness of the opinion of the Court of Appeals. Under the circumstances, the petition must be dismissed as improvidently allowed.

Petition dismissed.

---

[3] ORS 484.365:

"(1) Any Class A traffic infraction, as defined in subsection (3) of this section, shall be prosecuted and be punishable as a Class A misdemeanor if the defendant has been convicted of a Class A traffic infraction, as defined in subsection (3) of this section, or traffic crime within a five-year period immediately preceding the commission of the offense, and the previous conviction was not part of the same transaction as the present offense.

. . . .

"(3) As used in this section, 'traffic crime' means:

"(a) Driving while under the influence of intoxicants.

. . . .

"(4) As used in this section, 'traffic crime' means:

. . . .

"(b) Driving a motor vehicle while suspended or revoked."

[4] Under *Brown v. Mult. County Dist. Ct.*, 280 Or 95 570 P2d 52 (1977), defendant would have the procedural protections applicable to criminal trials in either event, but this would not affect the interpretation and interrelation of ORS 484.365 and ORS 484.396.

PER CURIAM.

Defendant appealed from a circuit court conviction for driving while his operator's license was suspended (DWS), ORS 487.560. He assigned as error the court's refusal to dismiss prosecution because the defendant had previously been convicted in municipal court of another offense which was charged against him on the same occasion, driving under the influence of intoxicants, ORS 487.540(1)(b). The Court of Appeals affirmed the DWS conviction. 46 Or App 109, 610 P2d 1242 (1980). We allowed review to consider whether the Court of Appeals misapplied statutory and constitutional rules of former jeopardy.

ORS 131.515 requires that charges based on a single criminal episode be joined for prosecution if the offenses are "reasonably known to the appropriate prosecutor at the time of commencement of the first prosecution and establish proper venue in a single court."[1] *See also State v. Brown,* 262 Or 442, 497 P2d 1191 (1972). ORS 484.395 excludes application of ORS 131.515 "if a person commits both a crime and a traffic infraction as part of the same criminal episode."[2] The effect of ORS 484.395 was not raised or briefed by either party. The record shows that the violation of ORS 487.540(1)(b) was charged against defendant as a crime (alleging similar convictions within the

---

[1] ORS 131.515:

(1) . . . .

"(2) No person shall be separately prosecuted for two or more offenses based upon the same criminal episode, if the several offenses are reasonably known to the appropriate prosecutor at the time of commencement of the first prosecution and establish proper venue in a single court."

. . . .

[2] ORS 484.395

"(1) Notwithstanding ORS 131.505 to 131.535, if a person commits both a crime and a traffic infraction as part of the same criminal episode, the prosecution for one offense shall not bar the subsequent prosecution for the other. However, evidence of the first conviction shall not be admissible in any subsequent prosecution for the other offense."

No. 285—May 12, 1980

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Respondent,
v.
LEROY OGLE,
Appellant.

(No. J79-1308, CA 15826)

Appeal from Circuit Court, Douglas County.

Don H. Sanders, Judge.

Argued and submitted March 28, 1980.

Dean Heiling, Roseburg, argued the cause for appellant. With him on the brief was Heiling & McIntosh, Roseburg.

W. Benny Won, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief was James A. Redden, Attorney General, and Walter L. Barrie, Solicitor General, Salem.

Before Richardson, Presiding Judge, and Thornton and Buttler, Judges.

RICHARDSON, P.J.

Affirmed.

RICHARDSON, P.J.

Defendant appeals his conviction of driving while his operator's license was suspended, a felony, ORS 487.560. The sole issue on appeal is whether prosecution of that charge is barred on the ground of former jeopardy. Oregon Constitution, Article I, Section 12; ORS 131.515(2).

On May 17, 1979, defendant was arrested while driving a motor vehicle in the city of Myrtle Creek and was issued three traffic citations. The citations charged, respectively, driving under the influence of intoxicants, ORS 487.540(1)(b); driving with more than .10 percent alcohol in his blood, ORS 487.540(1)(a); and driving while suspended, ORS 487.560, all alleged to be violations of state statutes. The two alcohol related charges were filed in the Myrtle Creek Municipal Court and the driving while suspended charge was filed in the district court.

On June 7, 1979, defendant was arraigned in the district court on a District Attorney's Information charging the felony of driving while suspended. Defendant waived a preliminary hearing and was bound over to the circuit court.

On June 13, 1979, the district attorney filed an accusatory instrument in the circuit court charging defendant with all three offenses. On that same day a representative from the district attorney's office called the Myrtle Creek Municipal Court and requested that the two charges against defendant, filed in that court, be dismissed. Neither the city attorney, the defendant nor defendant's attorney were notified of the request for dismissal. The charges were not dismissed and the district attorney's office did nothing further respecting that request.

On June 15, 1979, defendant was prosecuted on the two alcohol related charges in the municipal court by the city attorney. He was convicted and sentenced on the charge of driving while under the influence of intoxicants, ORS 487.540(1)(b).

> have been tried in the circuit court. The district attorney, *who had the right to control the prosecution in the district court,* was aware of defendant's prior felony conviction.* * *" (Footnotes omitted.) (Emphasis added.) 262 Or at 458.

Subsequent to the decision in *Brown* the legislature purported to codify Oregon's double jeopardy rules in ORS 131.515:

> "* * * * *
>
> "(2) No person shall be separately prosecuted for two or more offenses based upon the same criminal episode, if the several offenses are reasonably known to the *appropriate prosecutor* at the time of commencement of the first prosecution and establish proper venue in a single court.
>
> "* * * * *." (Emphasis added.)

In *State v. Hammang,* 271 Or 749, 534 P2d 501 (1975), the Supreme Court held the state was not barred under ORS 131.515(2) from prosecuting the defendant for murder after he had pleaded guilty to theft of the murder weapon allegedly arising out of the same criminal episode. In the course of the opinion the court said:

> "It is true that a prosecution following a plea of guilty subjects the defendant to two proceedings and two convictions, but the danger of undue harassment seen in *State v. Brown* is not present because the first proceeding resulting in a guilty plea *is initiated by the defendant himself and not by the state.* * * * " (Emphasis added.) 271 Or at 756.

The rationale of the principle announced in *Brown,* and codified in ORS 131.515, is to prevent undue harassment of a defendant by multiple trials on the several charges arising from a single criminal transaction, *State v. Hammang, supra.* Neither the constitutional principle of former jeopardy nor the statute prohibit the prosecutor from charging and trying a defendant for several offenses arising from a single transaction. What is controlling is the timing of the prosecution, i.e., the offenses must be united in one prosecution unless waived by the defendant. *See State*

State v. Ogle

On June 18, 1979, defendant was arraigned in the circuit court on the three charges reflected in the accusatory instrument filed by the district attorney on June 13, 1979. He moved for dismissal of all three charges on the basis of *State v. Brown,* 262 Or 442, 497 P2d 1191 (1972). The court dismissed the two alcohol related charges. Defendant was convicted, after trial to the court on stipulated facts, of felony driving while suspended.

Defendant argues the felony charge should have been dismissed pursuant to *State v. Brown, supra,* which held

> "* * *[t]hat under Article I, Section 12, of our constitution, a second prosecution is for the 'same offense' and is prohibited if (1) the charges arise out of the same act or transaction, and (2) the charges could have been tried in the same court, and (3) the prosecutor knew or reasonably should have known of the facts relevant to the second charge at the time of the original prosecution." 262 Or at 457-58.

The state agrees that the three charges arose out of the same act or transaction, that all the charges could have been tried in the circuit court and that the district attorney was aware of the factual basis of all three charges prior to the first prosecution. Defendant argues that all the elements of the test set forth in *Brown* were factually met and the charge should have been dismissed. On first blush, a reading of the test in *Brown,* in relation to the facts of this case, would seem to dictate the result sought by defendant. However, a closer analysis of *Brown* and its progeny leads us to conclude that the trial court was correct in denying the motion to dismiss.

In *Brown,* the Supreme Court, after setting forth the elements of the test, said:

> "Applying this test to the present case, we hold that defendant's plea of double jeopardy should have been allowed. It was stipulated that the two charges were based on a single act— carrying a concealed pistol. The first charge, as well as the second, could

v. Shields, 280 Or 471, 571 P2d 892 (1977). Implicit in the principle and its rationale is the requirement that the prosecutor take the necessary steps to combine the charges in a single prosecution. It follows, if a prosecutor is unable to lawfully move for consolidation he should not be prevented from proceeding on the charge that is within his control.

In *Brown,* the Supreme Court, in applying the rule previously set out in the opinion, said both charges, the misdemeanor filed in the district court and the felony filed in the circuit court, were under the control of a single prosecutor. He could thus have sought consolidation of the charges in the circuit court which had jurisdiction to try both offenses. In *Hammang,* the court based its holding, in part, on the fact that the prosecutor had not initiated a trial against defendant in the first proceeding resulting in defendant's plea. This indicates that the prosecutor must have some hand in initiating multiple prosecutions, and, conversely, the right to seek consolidation.

ORS 131.515(2) bars multiple trials of charges arising from the same transaction if the "several offenses are reasonably known to the *appropriate prosecutor.*" The appropriate prosecutor would be the one who has sufficient control of the multiple charges to be able to consolidate them for trial. If he has no such control or authority, he is powerless to do anything about the reasonable knowledge he possesses.

In this case the alcohol related charges, brought under state statute, were filed and tried in the municipal court which had jurisdiction, ORS 484.030(2). The prosecution of these offenses was in the control of the city attorney, ORS 484.030(3), and not the district attorney, ORS 8.660. The three offenses could not have been consolidated for trial in the municipal court because that court did not have jurisdiction of the felony charge. ORS 484.030(2). The city attorney, who had control of prosecution of two of the three offenses, could not seek consolidation. He

could have moved for dismissal of the charges and deferred to the district attorney the prosecution of all charges in the circuit court. However, he was under no legal obligation to do so. The district attorney had no authority to require the city attorney to seek dismissal or to appear as counsel for the state in the municipal court and move for dismissal. Under the circumstances of this case the state is not barred by ORS 131.515 or *State v. Brown, supra,* from prosecuting defendant on the felony charge.

Affirmed.

Opposition

Office-Supreme Court, U.S.
FILED
OCT 22 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-578

In the Supreme Court of the United States

OCTOBER TERM, 1981

LEROY OGLE,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the
State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Solicitor General
*RUDOLPH S. WESTERBAND
Assistant Attorney General
100 State Office Building
Salem, Oregon 97310
Telephone: (503) 378-4402
Counsel for Respondent

*Counsel of Record

QUESTION PRESENTED

Respondent rejects petitioner's statement of the question presented for review. Respondent submits that the issue is more accurately stated as follows:

ISSUE PRESENTED

Whether the double jeopardy provisions of the Fifth Amendment bar separate prosecutions of an offender for separate offenses.

TABLE OF AUTHORITIES

Cases

Page

State v. Brown, 262 Or. 442, 497 P.2d 1191 (1972) 3, 6

State v. Torrey, 32 Or App 439, 444, 574 P2d 438 (1978) 2

Waller v. Florida, 397 U.S. 387 90 S.Ct. 1184, 25 L. Ed. 2d 435 (1970) 3, 4, 5

Statutory Provisions

O.R.S. 8.660 2

O.R.S. 484.030(3) 2

O.R.S. 487.540 ..... 2, 5

O.R.S. 487.560 ..... 1, 5

OPINIONS BELOW

In a published opinion, the Oregon Court of Appeals affirmed petitioner's conviction. *State v. Ogle,* 46 Or. App. 109, 610 P.2d 1242 (1980). In a published decision, the Oregon Supreme Court dismissed petitioner's petition for discretionary review, as having been improvidently granted. *State v. Ogle,* 291 Or. 364, 630 P.2d 865 (1981).

JURISDICTION

Petitioner's jurisdictional statement is accepted.

STATEMENT OF THE CASE

Respondent accepts petitioner's procedural statement of the case as adequate for review. Respondent rejects petitioner's statement of the facts as inadequate and misleading. Respondent submits the following counter-statement of the facts.

COUNTER-STATEMENT OF THE FACTS

On May 17, 1979, petitioner was arrested by police officers of the City of Myrtle Creek, Oregon, and issued three citations: one for driving while suspended in violation of O.R.S. 487.560[1] (hereinafter DWS) and two citations for driving while intoxicated, in violation

---

[1] O.R.S. 487.560 provides inrelevant part:

"(1) A person commits the crime of driving while suspended if he drives a motor vehicle upon a highway during a period when his license or permit to drive a motor vehicle or his right to apply for a license to drive a motor vehicle in this state has been suspended by a court or by the division or revoked by the division or if he drives a motor vehicle outside the restrictions of a license issued under ORS 482.475 or 482.477."

of O.R.S. 487.540[2] (hereinafter DUII). The alcohol-related charges were filed in the Myrtle Creek Municipal Court and the driving while suspended charge was filed in the District Court of the State of Oregon for Douglas County .

On June 15, 1979, defendant was prosecuted by the city attorney on the two alcohol-related charges in the municipal court.[3] He was convicted and sentenced for the offense of driving under the influence of intoxicants in violation of O.R.S. 487.540.

---

[2]O.R.S. 487.540 provides:

"(1) A person commits the offense of driving while under the influence of intoxicants if the person drives a vehicle while the person:

"(a) Has .10 percent or more by weight of alcohol in the blood of the person as shown by chemical analysis of the breath, blood, urine or saliva of the person made under ORS 487.805 to 487.815 and 487.825 to 487.835; or

"(b) Is under the influence of intoxicating liquor or a controlled substance; or

"(c) Is under the influence of intoxicating liquor and a controlled substance.

"(2) Driving while under the influence of intoxicants is a Class A traffic infraction."

Two citations were issued for the DUII offense because the statue provides for two alternative methods of proof. Under section 1(a) the offense is proved by establishing a blood alcohol content of .10 percent or more. Under sections 1(b) and 1(c), the offense is proved by direct or circumstantial evidence establishing that the driver's ability was impaired due the influence of intoxicating liquor and/or a controlled substance. Whether or not one or more methods of proof are utilized, only one offense is defined by the statute and only one conviction can be had. *State v. Torrey*, 32 Or. App. 439, 444, 574 P.2d 438 (1978).

[3]O.R.S. 484.030(3) authorizes the prosecution of state traffic offenses by the city attorney in municipal court. The district attorney, on the other hand, is not authorized to appear in municipal courts. O.R.S. 8.660. In addition, the DWS and DUII offenses could not have been consolidated for trial in the municipal court because that court did not have jurisdiction of the felony DWS charge. *See generally, State v. Ogle*, 46 Or. App. 109 at 114-115.

On June 18, 1979, petitioner was arraigned in the Circuit Court of the State of Oregon for Douglas County on the three charges reflected in the accusatory instruments filed by the district attorney on June 13, 1979. Petitioner moved for dismissal of all charges on the basis of *State v. Brown,* 262 Or. 442, 497 P.2d 1191 (1972). The court dismissed the two alcohol-related charges. Following a trial to the court, petitioner was convicted of felony driving while suspended.

REASON FOR DENYING THE WRIT

The holding of the Court in *Waller v. Florida,* 397 U.S. 387, 90 S. Ct. 1184, 25 L. Ed. 2d 435 (1970) expressly does not apply to separate prosecutions of an offender for separate crimes.

ARGUMENT

In support of the petition for writ of certiorari, petitioner relies on *Waller v. Florida, supra.* There, the Court held that the double jeopardy provisions of the Fifth Amendment bar separate prosecutions of an offender for offenses which constitute the same crime. The Court expressly limited its holding to the particular question presented for review. The Court said:

> "We act on the statement of the district court of appeal that the second trial on the felony charge by information 'was based on the same acts of the appellant as were involved in the violation of the two city ordinances' and on the assumption that the

> ordinance violations were included offenses of the felony charge. Whether in fact and law petitioner committed separate offenses which could support separate charges was not decided by the Florida courts, nor do we reach that question. What is before us is the asserted power of the two courts within one state to place petitioner on trial for the same alleged crime." *Id.* 397 U.S. at 390.

The Court held that separate trials for the same offense, whether by the same or by different political subdivisions of the state, are barred by the Fifth Amendment double jeopardy provisions. The Court said:

> "* * * we hold that on the basis of the facts upon which the Florida District Court of Appeals relied petitioner could not lawfully be tried both by the municipal government and by the State of Florida. In this context a 'dual sovereignty' theory is an anachronism and the second trial constituted double jeopardy violative of the Fifth and Fourteenth Amendment to the United States Constitution.
>
> "We decide only that the Florida courts were in error to the extent of holding that — 'even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court.'" *Id.* at 394-395.

The special care taken by the Court in *Waller v. Florida* to distinguish the question presented from questions which were not has fallen upon deaf ears. In the case at bar, petitioner relies on *Waller v. Florida*

despite the obvious fact that driving while suspended and driving while under the influence of intoxicants are separate and distinct crimes. They require the proof of entirely different facts and are designed to protect against entirely different evils.

To establish the DWS offense, the state must prove that the defendant drove while his license to drive was suspended or revoked. O.R.S. 487.560. The obvious evil that the statute was intended to prevent, is the operation of a motor vehicle during the period of a license suspension or revocation. On the other hand, to establish the offense of driving while intoxicated, the state must prove that the defendant drove while under the influence of intoxicating liquor or a controlled substance. O.R.S. 487.540. The particular evil to be prevented is the operation of a motor vehicle while the driver's physical and mental ability to do so is impaired.

The double jeopardy clause of the federal constitution protects an offender from being twice prosecuted by one sovereign for acts constituting a single transgression of law. *Waller v. Florida, supra.* In the case at bar, the Oregon Supreme Court recognized that the holding of the Court in *Waller v. Florida* does not apply to the present facts. The issues before the Oregon courts concerned the meaning and application of double jeopardy provisions of the Constitution of the

State of Oregon as codified by statute. *See generally, State v. Ogle, supra,* 47 Or. App. 109 and *State v. Brown,* 262 Or. 442, 497 P.2d 1191 (1972). The Oregon Supreme Court dismissed petitioner's petition for discretionary review as having been improvidently granted, on bases which were relevant only to a proper analysis of the state law questions present. 291 Or. 364. Petitioner's petition for a writ of certiorari is not well founded and should be denied.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Solicitor General
RUDOLPH S. WESTERBAND
Assistant Attorney General
Counsel for Respondent

October 15, 1981